United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6072

ORIGINAL

To be argued by
WILLIAM R. KLEIN

8/9/76

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In The

United States Court of Appeals

For The Second Circuit

In the Matter of WILLIAM ROBERT KLEIN a/k/a WILLIAM R. KLEIN,

An Attorney,

P/S

WILLIAM ROBERT KLEIN,

Appellant,

DAVID N. EDELSTEIN, Chief Judge, U.S.D.C.S.D. N.Y.,

Respondent.

APPELLANT'S REPLY BRIEF

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Appellant

DAVID N. EDELSTEIN ,Chief Judge,U.S.D.C.,S.D.N.Y

APPELLANT'S REPLY BRIEF

The respondent has opted to retain counsel(p.2 Brief), who authors his tardily served Brief,but also submits a voluminous Appellee's Addendum (AA).Respondent has thus accepted a modified role. He had denied adversary status (AA-29).

Over repeated objection, he detained to himself,and pre-empted the entire matter for an excruciating 16-month period after notifying appellant of his automatic order of disbarment. (October 10,1974 to January 16,1976) pursuing a private "investigation".

This was in radical departure from his assigned judicial function in the General Court Rule 5(d),cited in extenso, at p.8,as the"relevant rule"by his counsel. That source of his authority prescribed rather a 30-day limitation rule, upon which appellant hopefully acted,and urged the Chief Judge.(A-2,3 et al., et seq.)

On January 16,1976,he returned to "hear" the matter, with some ultimatum undertones (AA 2,19,29).He disclosed nothing of his findings on that 16-month expedition.He sought only "reasons","grounds",arguments"for a vacature of his automatic order.(AA 2,16,17,19,20,25,26,29). He seemed not at all inclined to grant the sworn hearings ,that might be necessary, if demonstration of the applicability of the four safeguards of the Rule were in order, to bar the adoption of the state court judgment, as by the rule reserved.(AA29,30), particularly with respect to the "infirmity of truth" in the guilt findings of the state court.(AA-30)

Therefore, when appellant was surprised by the Chief Judge's Opinion of February 2,1976 bringing into question,appellants,now verified,versions of the state court record,especially those relevant ones preceding the June 29,1965 disbarment judgment,appellant for the first time, was compelled to move for the formal sworn hearings, and moved promptly.(A-7)

But appellant was again surprised by his denomination of that substantive motion, as one in "reargument" only(A-9).

Never once had the Chief Judge offered dispute or contradiction of the appellant's oral presentations of January 16,1976, or of any of his prior affidavits or letters (A-2 et seq. to A-23) including legal Memoranda upon the facts.

On that account, appellant welcomes the heavy-volumed Appellee's Addendum of the United States Attorney now, only because it corroborates entirely,appellant's presentations below.

Nor has the United States Attorney taken a single exception from that volume, to any report made by appellant, or version of those state court events or proceedings.

Why, then, one must ask, has the United States Attorney seen fit to bring this most revealing record of the State proceedings into print on this appeal?

The answer must be, it is submitted, that he, as a member of the United States Department of Justice, felt surely, a grave injustice to this appellant, and to allow the "principles of right and justice" to operate (quoting his Selling and Theard case excerpts (p.10), however belatedly; while, at same time, attempting to defend the existing Opinions of the Chief Judge. For it must be truly said, that the doubts raised by the Chief Judge's Opinions, dissolve before these Addendum disclosures. He followed in the footsteps of his predecessor (AA 7,8)

Under the caption, "Issue Presented" at p.2, it is clear that the Chief Judge's Order of federal Disbarment rests, and is predicated solely upon the June 29,1965 state disbarment order, per se, as a "constitutionally sufficient" basis therefor. Immediately below, counsel, by misnomering the nature of appellant's "attack" as one on the "proceeding" in the state court, and its unconstitutionality, then makes it appear that the Chief Judge had correspondingly "relied", - on September 25,1974, - when he made that order, upon any more, than the June 29,1965 judgment presented to him, - so as to open the door to his use of all the subsequent "history of

the proceedings" to overcome that judgment's inherent voidness. It were more accurate to say that the Chief Judge, in pure afterthought process, in defense of his issuance of the order, sought cover in the subsequent "history", to "mitigate" or "cure" the admitted absence of the fundamental constitutional guaranties. As we have shown in our Memorandum of March 5, 1976, such refuge is barred by the United States Supreme Court; no curability lies in "subsequent" proceedings, (A-8) for acknowledged lack of due process, holding that vacature alone cures. (More later.)

Appellant's legal posture was simple from the outset, before the Chief Judge:

> That the Chief Judge's order of disbarment recited and rested upon the state disbarment order of June 29, 1965; that same was constitutionally and statutorily void on its face, for lack of recital of statute-required due process and procedures "BEFORE" its issuance; and that such face only reflected that actual dual lack; and that with the subsequent state court's own elimination of some 4 1/2 of the original findings of guilt, recited in the inseparable Opinion of even date, that judgment became obsolete in any event, and so could not be a foundation for any federal order, under Rule 5(d). (New York CPLR Sec. 5011) (Sec. 90 J.L.)

The Chief Judge, in suspensefully withholding all his "investigated" findings, was denying to the appellant, the basic right to be confronted by his accuser, to meet and rebut. He had been largely informed, by affidavits, letters etc., from the appellant in that 16-month period before that climactic "hearing", of appellant's claims and contentions.

The Report of the U.S. Attorney, of the Eastern District of September 9, 1968, which does not appear in the Appellee's

Addendum,disclosed that such a judgment could not serve as a predicate, under Rule 5,and could not be followed by any valid proceedings,on such foundation. That United States Attorney had ,upon demand of his Chief Judge,made a three-year Investigation,and a copy of said Report was duly served upon this appellant.

Nor did the Addendum include the appellant's Main Brief filed in the New York Court of Appeals, which touched on every issue;and it particularly took up, seriatim, each of the charges of the Prosecutions Petition of December 16,1964, set out in extenso in the Addendum,and in the Appellee's Brief (pp.3-4),and demonstrated the makeweight ,and trivial nature of those charges and the alleged evidence.Under Court Rule 5 d,that would be relevant, to be sure,particularly safeguards Nos. (2)(3) and (4),(p.8),on a sworn hearing,so hastily denied, by appellee's second decision of March 1º,1976(A-9).Appellant's motion,therefor, was denominated a motion for reargument only.(A-9).

Appellee deploringly condones the constitutional failures as merely "economic disadvantages".(p.12)Such view is in sharp contrast with those,so consistently held by the Justices of the Supreme Court for many years,deeming sacred the enjoyment and the protection thereof, of the privilege of membership at the Bar,and abhorrent,the stigma attaching to its loss, temporary or permanent.

But the Fuentes case (post) made even that crasser economic consideration, a grave one to be avoided by unconstitutional offenses of the Courts.

Appellee's recourse to the use of the terms "sufficient due process" and the"totality" of the state proceedings are also regrettable adulterations,in detraction from the accepted fundamental significance of the "BEFORE" constitutional standards,specially codified into the state disciplinary statute(Section 90(6) Judiciary Law).

The cited Selling and Theard cases speak of a "duty" "not to disbar"(p.10),those cases now "codified" in the Southern District Court's Rule 5 d(operative also in the Eastern District).

Appellee's Brief at p.8,saliently omits,in recounting the state's Court of Appeals' noting,

> "that the order of disbarment(of June 29,1965) was predicated solely on the charges in the petition for disbarment,rejecting intimations in the Appellate Division's Opinion that a charge not contained in the Opinion might have been the basis for the order".

that ,on the contrary,that said Opinion,admittedly a joint part of the Order(A-6,p.4),has a specific recital that the disbarment penalty was "required" in the presence of a finding of such guilt,and notwithstanding the total absence of such a charge inthe Petition.(AA,345,350,354)

Moreover, that such charge, or any of the charges, contained in the Petition, which, for jurisdictional sufficiency, would have had to be recommended by the presiding Judge of the Judicial Inquiry (AA-417) in, and by a Report, was ever so recommended, is belied by the Prosecutor's own statement (AA-314,5). In fact, such Report, alleged to have been made by Justice Baker, in the Petition, never appeared to this day (AA-371, 315). Indeed the proceedings were strange (AA-85), and sheer power, not law and order, seemed at work, to produce that disbarment order, so abrupt in nature (A-234). Certainly, the Chief Judge, after his Investigation, should have brought the safeguard provisions of Rule 5 d (1)(2)(3)(4) into protective operation.

That the state courts were consciously, and openly most hostile and predetermined adversaries of this appellant, despite his absolutely clean record (AA 313, 369), has now been brought into the open by the United States Attorney here; so that the Chief Judge, when he became privately aware thereof, it would seem, became obligated to vacate his ex parte order of disbarment. (AA-293-315 incl.). Special reference is here had to the last paragraphs of AA 309, 315, and 306.

That obligation was shown the greater, upon demonstration that the Chief Judge was imposed upon, when he yielded that ex parte Order of September 25, 1974 (AA-3),

by the deliberate withholding from him of the historic fact of the prior 3-year Investigation in the Eastern District by its United States Attorney upon order of its Chief Judge ,upon exactly like application for federal disbarment there,his Report to the Chief Judge and the dismissal of that application.

The Appellee's Brief avoids completely all reference to the due-process requirement on the State courts to set aside the judgment of disbarment, with their dismissals of findings of guilt, upon which the judgment was based,and the three case citations, two,of the state Court of Appeals, and the one of the Supreme Court(Del Bello,Sarisohn;and Gompers vs.Buck Stove respectively), requiring thereupon a reassessment of penalty. Thus, appellant was denied the equal benefit of the state law, prescribed by the 14th Amendment.

It is now beyond dispute, that the state court proceedings were retaliatory in nature. The Chief Judge however, found appellant's use of that term, "conclusory":His Addendum leaves no further doubt (A-9,AA 291-315);and also,as to the repeated tenders by the Chief Judge, of the normal presumptions of good faith,and normal confidence, ,attributed to the membership of a high confrere Bench of the State of New York,

thereby to overcome our claims (A-6). With the U.S. Attorney's production of the Appellee's Addendum, the case must now be deemed free of those normal presumptions.

Appellant submits that the abruptness of the state disbarment order, and the continuing retention of that disbarment, despite the obsolescence of that judgment, can only be attributed to such retaliatory prevalence, in high places. (AA 365, par. h).

While the Chief Judge and the state courts often repeat the appellant's failure to "deny" the charges,, it is refreshing to have the U.S. Attorney now concede that appellants "Answer", an 11-ground plea "in bar and demurrer" (AA-364) did in fact contain (p.5)

"a number of defenses";

precisely as the Eastern District's United State's Attorney had reported to his Chief Judge; which normally require a trial, instead of a summary finding and dismissal as being "without merit" (p.5).

Here, will be relevant two recent disciplinary cases reported in the N.Y. Law Journal, front page, of June 17, 1976 and July 29, 1976 (Re Warde, and Re Parisi, Attorneys). Therein, the attorneys failed to appear, answer or oppose the charges in any way, yet a Referee is designated to take, and test the sufficiency of the evidence, and report thereon

back to his appointing Appellate Division(Second and First Departments alike),subject to motion to confirm. Only in Appellant's case,and wherein intention to defend was at once brought home by such extensive Answer of a preliminary nature, as authorised by state law,was that customary,and due process cast aside(as shown unprecedented since 1735 in New York legal history)(AA 295)).

The U.S.Attorney's introduction of the Addendum would seem to necessitate either the vacation of the Chief Judge's Order of September 25,1974, or the sworn hearing on the four safeguard issues set up in the Rule 5d.

Rule 5 d is clear,that the proceedings,preceding the disciplinary order of the Chief Judge,are to be the test;for,it reads that the judgment of the state court is to bind him,

> "unless an examination of the record, resulting in such discipline,discloses..

a prior

> "lacking in notice or opportunity to be heard".

The gist is the priority, as the state statute literally prescribes,using the word"BEFORE";barring any subsequent shoring-up or "establishing" process. It is submitted that the very thought is inimical to the protection contemplated. And so the Supreme Court has most recently held

in the Fuentes case;not to be found referred to,in either the Chief Judge's second Opinion (A-8)dated March 19,1976, responding to Appellant's March 5,1976 Memorandum letter, quoting therefrom at great relevent length, nor in the Appellee's Brief.

Appellant's Brief did not quote it,but in interest of brevity, asked a reading of that Memorandum letter.Appellant now quotes from two Supreme Court cases,Fuentes and Berger,- the latter in reference to an equally relevent principle in view of Court Rule 5(d) safeguards.

The Fuentes case bars the"subsequent"curability" proposition, invoked by the Chief Judge, and the concepts of"constitutionally sufficient" and "totality", patchwork approach. . It is incompatible with such blurring approach, seeking to dull the sharp edge of constitutional guarenties, thus to render them nil. It has been held,that a judgment, lacking that due process,cannot command judicial respect anywhere(A-4,p.4)Mooney v.Holahan,294 US 103,and Justice Frankfurter in 330 U.S at p.309. The only remedy is vacatur first. We quote: (Fuentes v.Shevin,407 US 67(1972)

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making,when it acts to deprive a person of his possessions. The purpose of the requirement is not only to insure abstract fair play to the individual.Its purpose,more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property...So viewed,the prohibition against the deprivation of property without due process of law,REFLECTS THE HIGH VALUES EMBEDDED IN OUR CONSTITUTIONAL AND POLITICAL

"HISTORY, THAT WE PLACE ON A PERSON'S RIGHT TO ENJOY WHAT IS HIS, FREE OF GOVERNMENTAL INTERFERENCE.(citing cases)(emphasis added)

"If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted AT A TIME WHEN THE DEPRIVATION CAN STILL BE PREVENTED. At a later hearing an individual's possessions can be returned to him, if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. BUT NO LATER HEARING AND NO DAMAGES AWARD CAN UNDO THE FACT, that the arbitrary taking that was subject to the right of procedural due process HAS ALREADY OCCURRED. "This Court has not embraced the general proposition THAT A WRONG MAY BE DONE, IF IT CAN BE UNDONE.(Stanley vs. Illinois, 405 US 645,7)... OPPORTUNITY FOR THAT HEARING MUST BE PROVIDED BEFORE THAT DEPRIVATION TAKES PLACE(citing cases)(citing the attorney's disciplinary case of Re Ruffalo 390 U.S. 544(emphasis added)

At p.85:

"It is now well settled that a temporary, non-final deprivation is NONETHELESS a "deprivation" in the terms of the 14th Amendment.(Sniadack vs. Family Finance Corp. 395 US 337.(Referring to the Ruffalo case ante, pertinently, Justice Douglas therein emphasized:

"As noted, the charge (no.13) for which he stands disbarred, was not in the original charges made against him."

The Fuentes opinion cited the Armstrong v. Manzo opinon wherein is raised the specific question (380 US 545)

"--whether the SUBSEQUENT HEARING ON THE PETITIONER'S MOTION TO SET ASIDE THE DECREE SERVED TO CURE ITS CONSTITUTIONAL INVALIDITY"

Holding sharply in the negative, it went on to contradict the State of Texas Civil Court of Appeals, bolstered by "Texas precedents", which supported the curability by "subsequently affording)ed to him upon his motion to set aside the decree. And the Court, in overrule,(at p.552),

declaring that the opportunity for due process, to be heard"must be granted at a meaningful time and in a meaningful manner", adding

> "The trial court could have fully accorded this right..only by granting the motion to set aside the decree AND CONSIDER THIS CASE ANEW. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied,had due process been accorded to him in the first place. His motion should have been granted".

This appellant made such very motion,and same was denied(AA 325),dated August 3,1965(AA 331). In the instant case, it bears repeating,that,not only was essential notice lacking,but literally,the right to hearing on the noticed charges,was snapped off,when the legal procedure for responding,on the merits, arrived. The Appellate Division, on the same day that that it dismissed respondent's motion to dismiss for legal insufficiency of the Complaint,granted Petitioner's motion for discipline, cutting off the UNIVERSAL right of a defendant, under the state's Civil Practise Law and Procedure Act,to serve an Answer to the merits,after proof of service of the order of denial(Sec.3211(f) and 404 (CPLR),

The Berger case (Berger v.U.S.,255 US 22,) was cited by appellant in A-8, for its inseparable

relevancy, in view of the permeating claims of bias, to the operation of the safeguards under Court Rule 5d.

> "To commit to a judge a decision upon the truth of a fact gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists, it has worked its evil; and a judgment of it in a reviewing tribunal is PRECARIOUS. It goes there fortified by PRESUMPTIONS."

(The Chief Judge's Opinion bears witness (see lower page 5, and p.6, footnotes No.17, 19, 21, A- .)

It is clear that the art of the Chief Judge's Opinion was to condemn the judgment, only to preserve it by "subsequent" proceedings,

It is submitted, that after the examination of the state court records, and the Report of the United State's Attorney of the Eastern District, the burden of the Chief Judge, under General Court Rule 5 d, must be deemed to have grown, since that record disclosed that this appellant, in the State Court, had raised questions of the jurisdiction of the very proceedings, the extant bias and hostility, and adversary status of the judgment-issuing Court, the constitutional failures of each of the State forums, before judgment, and after dismissal of the some 4 1/2 of the original findings of guilt and the charges upon which they rested, creating as it were a "whole new ball-game".

Respectfully submitted

William R. Klein

WILLIAM R. KLEIN, app. pro se.

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

Court of Appeals
For The Second Circuit

WILLIAM ROBERT KLEIN a/k/a WILLIAM R. KLEIN
an Attorney
WILLIAM ROBERT KLIEN,
Appellant.,

- against -

DAVID N. EDELSTEIN,
Respondent.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 9th *day of* August *19*76 *at* Foley Square, New York New York

deponent served the annexed Reply Brief *upon* David N. Edelstein Chief Judge District Court

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 9th
day of August *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA